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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

vs.

PATRICK J. BRENNAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is the amount of the first award of punitive damages in Guam asbestos litigation reasonable:

(a) in light of the defendant's egregious death-dealing conduct through which, knowing full well the dangers of asbestos, the defendant advertised its product as safe and "non-toxic," continued to manufacture and supply a hazardous product, and refused to provide warning labels in order to protect its profit margins;

(b) when at the time of trial the defendant had yet to pay a single punitive damages award for its reprehensible conduct; and

(c) when compared to the extraordinary billion dollar plus asset value of the defendant?

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In the

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October Term, 1995

No. 95-800

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

PATRICK J. BRENNAN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

This is the response of Respondent, Patrick J. Brennan, to the Petition for Writ of Certiorari submitted by Petitioner, Owens-Corning Fiberglas Corporation. Mr. Brennan's family respectfully requests that this Court deny the Petition.

OPINIONS BELOW

The opinion of the United States District Court, sitting as the Court of Appeal for the Territory of Guam, was not published. The opinion of the Ninth Circuit Court of Appeals was not published. Both opinions are reproduced in the Appendix submitted with the Petition of Owens-Corning Fiberglas Corporation [hereinafter OCF].

JURISDICTION

Respondent adopts the Statement of Jurisdiction in the Petitions with this exception: The issue of whether the punitive damage awards violated due process because OCF was subjected to prior awards of punitive damages for the same course of conduct was not presented to the trial court. Since the issue was not preserved for appellate review, neither the Appellate Division of the District Court nor the Court of Appeals passed on the question. That issue, therefore, is not properly presented to this Court. S. Ct. R. 10(c), 14(g).

STATEMENT

I. The Facts: This is the *first* punitive damages case in asbestos litigation in Guam.

Patrick J. Brennan was diagnosed as suffering from malignant mesothelioma and asbestosis, both asbestos-caused diseases. He contracted his illness due to exposure to asbestos-containing products of OCF and others during his years of employment. (A.31a.) Most of Brennan's

exposure came after 1953, and OCF's Kaylo was the product he used most of the time.[1] (A.20a-21a.)

Kaylo was an insulation product with an asbestos content ranging from eleven to twenty-one percent. (Record [hereinafter R.] 209-13, 562-63.) Owens-Illinois originally developed Kaylo. Pursuant to agreement, OCF began to distribute Kaylo in 1953, and in 1958 bought the Kaylo business from Owens-Illinois. OCF manufactured and sold asbestos-containing Kaylo until 1973. It also re-branded and sold other manufacturers' products as Kaylo. (R.222, 768-78.)

Although OCF knew that asbestos dust was "a first class disaster" in the making, it persisted in advertising Kaylo as "nontoxic." (Supp. R.23, 28; R.248.) OCF did not place warning labels on Kaylo because labels meant OCF "would have had a little harder selling job," and Kaylo's profitability would have been diminished. (R.426-27.) In 1972, OCF was still trying to avoid complete disclosure on labels. (Brennan Ex. 64 ("Why say 'always' [use a respirator] if not required in national standard?").)

OCF claims it complied with government and industry standards set by the "American Conference of Governmental Industrial Hygienists." (Pet. 4.) The Conference was not a government agency. It was simply a voluntary group of interested persons who met periodically to make recommendations concerning industrial hygiene. *See, Borel v. Fibreboard Paper Products Corp.*,

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[1]Mr. Brennan died from the mesothelioma shortly after trial. He was 60 years old.

493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). At trial, OCF was totally unable to articulate any federal government safety standard which applied to Kaylo, or any state regulation in any state where OCF distributed the products to which Brennan was exposed, and could not show it met any standard whatsoever, public or private.[2] (R.687-88, 690 (OSHA did not exist when Brennan was exposed to Kaylo).

OCF did *not* comply with the voluntary guidelines set by the Conference, either. OCF implies it tested Kaylo in the 1960s and the dust generated by its tests showed Kaylo could be used without exceeding levels then thought to be safe by some in government and industry. (OCF Pet. 3, 4.) But, at trial, the evidence established that OCF conducted no tests whatsoever to measure levels of asbestos dust to which users were being exposed.[3] (R.30; Brennan

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[2]OCF argues a one-sided view of the facts -- its view. We remind OCF that Guam rules of appellate procedure require that facts asserted in briefs be "supported with appropriate references to the record." Guam R. App. P. 14(a). Arguments in briefs are to be supported by "citations to the authorities, statutes and *parts of the record relied on*." *Id.* (emphasis added); *compare*, Cal. R. Ct. 13 ("The statement [of material facts] shall be accurate and confined to matters in the record on appeal."). The same rule applies in this Court. S. Ct. R. 14(g).

Also, OCF appears to have forgotten that reviewing courts examine the evidence in the light most favorable to the prevailing party and draw all reasonable inferences in favor of that party. *Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir. 1987).

[3]OCF claimed in its brief to the Appellate Division that the Conference set in 1946 a threshold limit value (TLV) of five million

(continued...)

Ex. 78 (OCF Memo 7/31/62 ("We currently have no specifications or test method for dustiness.").)

II. Trial Court Proceedings: The bifurcated trial commenced in June of 1991. In Phase I, the jury found Mr. Brennan had asbestos-related mesothelioma and asbestosis, his diseases were caused by exposure to the products of OCF and others, and his damages were $2.5 million. (C.R. 1902.) In Phase 2, the trial court gave the full panoply of California jury instructions on product

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[3](...continued)
particles of asbestos-laden dust per cubic foot (MPPCF) of air, and that it complied with the TLV. Putting aside the fact that the Conference lacked any force of law, OCF did not comply with it. Five million particles per cubic foot are totally invisible. The unaided eye cannot discern Kaylo dust until the particle count climbs to 800 million particles per cubic foot. Brennan and his co-workers described the dust generated by Kaylo as akin to a blizzard or a snowstorm. (Supp. R.116.) This hardly shows full compliance with a TLV of five MPPCF.

Although OCF did not test Kaylo, tests conducted by outsiders, with results communicated to OCF, revealed dust levels far above the then suggested TLV of five MPPCF. (Brennan Ex. 33 (dust sample at 91.8 MPPCF); R.956, 1006 (Kaylo dust counts exceeded 20 MPPCF).)

OCF requested an instruction telling the jury that "[c]ompliance with government safety standards constitutes strong and substantial evidence that a product is not defective." (C.R. 1971, Instr. No. 3.) There being no evidence to support the instruction, the trial court correctly refused to give it. (R.690.) Moreover, since the requested instruction did not encompass industry standards, OCF has waived any right to raise compliance with industry standards in reviewing courts. *Harmsen v. Smith*, 692 F.2d 932, 939 (9th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983).

liability and punitive damages.[4] (R.1120.) The unanimous jury found that OCF manufactured a defective product, that Mr. Brennan's diseases were reasonably foreseeable by OCF, and OCF acted in deliberate disregard of Mr. Brennan's rights. The jury awarded punitive damages against OCF of $4.125 million. (C.R.1979.)

OCF filed a motion for a new trial, challenging, *inter alia*, the punitive damages award. On November 4, 1992, the trial court denied the motion, concluding OCF received due process because the jury (1) was properly instructed, (2) and exercised its discretion to impose punitive damages with reasonable restraint. (A.35a-39a.) OCF claims here that the trial court did not address OCF's contention that the award was excessive. However, the trial court did find the award was not excessive since it ruled there was no due process violation in that the "checks and constraints" placed on the jury were "sufficiently definite and meaningful" and thus reasonable.[5] (A.39a.)

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[4]California cases are not binding in construing Guam law, but are persuasive. *Roberto v. Aguon*, 519 F.2d 754, 755 (9th Cir. 1975). The trial court expressly stated it would use California jury instructions and California law in this case. The reviewing courts also used California law. (A.8a n.2.)

[5]OCF faults the trial court for relying primarily on this Court's decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). (Pet. at 5.) When the court ruled, this Court had not yet decided *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), or *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993.) Since *Haslip* was the Court's most recent decision on the issue, the trial court appropriately relied upon it in concluding the award of punitive damages satisfied due process.

III. The Appeals: In its appeal to the Appellate Division for the Territory of Guam, OCF argued that the amount of damages awarded was excessive, particularly since OCF already had incurred liability for numerous compensatory and punitive awards. (App. Div. Br. 33, 54-55.) Yet, OCF presented no evidence at trial that a jury had already imposed punitive damages on it, the damages had been paid, and the sum was sufficient to punish and deter.

In reviewing the size of the award, the District Court held the jury was correctly instructed, the trial court gave OCF a constitutionally adequate posttrial review, and the award was reasonable and rational in light of the twin purposes of punishment and deterrence. The award

> presumably reflects the jury's and the trial court's assessment of the harm to appellee, the bad faith of appellant, a larger pattern of concealment by appellant of the dangers of its product, and appellant's wealth.

(A.28a.) OCF appealed to the Ninth Circuit, once more complaining that the award was excessive and that the lower courts failed to afford OCF its due process rights by allegedly failing to review the size of the award. Once again OCF complained that appellate review must take into consideration prior awards, and those which may be granted in the future. (OCF Ninth Cir. Br. 23.) Nonetheless, OCF did not -- could not -- point to *any* evidence that at the time of trial it had paid *any* punitive damages or introduced any evidence with respect to the issue of actual past or speculative future awards.

The Ninth Circuit also held that trial conducted the review of punitive damages necessary to satisfy the requirements of due process.[6] (A.2a.)

REASONS FOR DENYING THE WRIT

OCF contends that it was denied independent review of the size of the punitive damage award in the trial court, in the Appellate Division, and in the Court of Appeals. OCF also contends the size of the award is grossly excessive because OCF followed government and industry standards and because of past awards of punitive damages and the potential for future damages rising out of the same course of conduct.

As we have explained above, there were no federal government standards in force during the time when Mr. Brennan was exposed to Kaylo, no state standards in States and Territories where OCF distributed the Kaylo to which Mr. Brennan was exposed, and OCF did not present evidence that it complied with voluntary industry standards. The point has been waived.

OCF has also waived any right to complain to this Court about successive punitive damage awards because it did not present any evidence in the trial court of prior punitive damages awards imposed and paid, or of the reasonable certainty of future awards. As a consequence,

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[6]OCF notes that Circuit Judge Kozinski dissented. However, Judge Kozinski's dissent involved procedural issues related to liability. He expressed no dissenting opinion as to the propriety of the size of the punitive damage award. (A.2a.)

the issue was not preserved for review in the District Court, and could not properly be presented for review to the Circuit Court of Appeals. Therefore, neither court decided an important federal question, and review in this Court is inappropriate. S. Ct. R. 10(b), (c), 14(g).

Asbestos companies have already sought and been denied certiorari on the same issues raised here.[7] The petition in the instant case should also be denied. This -- the first award of punitive damages in asbestos litigation in the Territory of Guam -- is not in need of the Court's attention.

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[7] *See, e.g., Kochan v. Owens-Corning Fiberglas Corp.*, 242 Ill. App. 3d 781, 610 N.E.2d 683, *cert. denied*, 113 S. Ct. 2335 (1993); *Johnson v. Owens-Corning Fiberglas Corp.*, 233 Ill. App. 3d 425, 599 N.E.2d 129, *cert. denied*, 113 S. Ct. 2335 (1993); *Owens-Corning Fiberglas Corp. v. Adams* (W.Va. 1990), *cert. denied*, 113 S. Ct. 3035 (1993); *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993).

I. THE COURTS DID REVIEW THE SIZE OF THE PUNITIVE DAMAGE AWARD

OCF contends it did not obtain any review of the size of the awards in any of the three courts which reviewed the matter. As we show, OCF is mistaken.

A. The Trial Court Provided Posttrial Review in Conformance with Haslip

The crux of OCF's first complaint is that the trial court did not articulate reasons for upholding the punitive damage award and, in any event, based its ruling on assumptions. (Pet. 7-8.)

First, this Court has never held that the trial judge must reduce to writing his reasons for upholding a punitive damages award. In *TXO*, the trial court did not specifically articulate its reasons for upholding the punitive damages award. Rather, the trial court reviewed the challenge to the sufficiency of the instructions and determined in a thorough, ten-page order that they were constitutionally adequate. Even though it would be *helpful* for trial judges to explain their rulings, a court's failure to do so is not required by the Due Process Clause or California law. TXO, 113 S.Ct. at 2724; *Las Palmas Associates v. Las Palmas Center Associates*, 235 Cal. App. 3d 1220, 1258 n.8, 1 Cal. Rptr. 2d 301 (1991). In the instant case, as in *TXO*, the trial court issued a thorough ten-page order upholding the constitutionality of the punitive damages award. (C.R.2249.) Further, inasmuch as *TXO* had not been decided when the trial judge ruled, he should not be faulted for not being more explicit in his order.

Second, we do not have the benefit of the trial court's comments during argument on the posttrial motions because OCF did not order the transcript. In every jurisdiction it is the appellant's obligation to provide an adequate record. Fed. R. App. P. 11(a); *Dienes v. Vermeer Mfg. Co.*, 969 F.2d 977, 979 (10th Cir. 1992 (lack of transcript fatal to appellant's appeal); *Ballard v. Uribe*, 41 Cal. 3d 564, 567, 574-75, 224 Cal. Rptr. 664 (1986) (alleged errors not cognizable since appellant failed to provide adequate record). OCF has waived any right to complain about an alleged deficiency in the record.

Third, "a punitive damage award is excessive if it is disproportionate to the defendant's ability to pay." *Adams v. Murakami*, 54 Cal. 3d 105, 112, 284 Cal. Rptr. 318 (1991). A fair reading of the trial court's ruling indicates it did consider whether the award was excessive. The court realized that OCF made the claim. (A.31a.) The court knew its posttrial role was to make sure the award was "*reasonable* in amount and *rational* in view of its purpose of retribution and deterrence, rather than the product of unbridled jury discretion." (A.34a (emphasis in original).) The court recognized the instructions made sure the amount imposed would "not in effect siphon all capital from the defendant so as to leave it nonfunctional in its financial capacity." (A.36a-37a.)

Lastly, the court concluded that because the jury exercised reasonable restraint in imposing punitive damages, due process was satisfied. (A.38a-39a.) The trial court's conclusion surely negates OCF's claim (Pet. 8) that it did not obtain adequate review, and may have been the victim of a "a lawless, biased, or arbitrary verdict." *Honda Motor Co. v. Oberg*, 114 S. Ct. at 2341. Of

course, when it ruled, the trial court did not have the benefit of this Court's reasoning in *Honda*. Nonetheless, it would seem unassailable that the court's order expressly reflects its awareness of its duty and implicitly reveals performance of that duty -- its conclusion that the amount of punitive damages was constrained and reasonable.

OCF is a multi-billion dollar international conglomerate. (Brennan Ex. 69, 70.) There was no evidence presented to the trial court that the damages imposed were disproportionate to OCF's ability to pay or constitutionally intolerable because of prior payments of punitive damages. Consequently, the trial court's implied conclusion that the amount of punitive damages was reasonable and did not exceed constitutional limits was absolutely correct.

B. The Appellate Division Provided Appellate Review in Conformity with Haslip and TXO

OCF contends the Appellate Division "failed to conduct any review of the size of the punitive award." (Pet. 6, 9 n.2.) This is not accurate.[8]

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[8]In a footnote OCF decries the Appellate Division's reluctance to impose a rigid set of review standards on the Guam courts. OCF suggests the court was remiss in not doing so because the court abdicated its duty to enforce the Due Process Clause. (Pet. 8 n.2.) The Appellate Division was keenly aware of its obligations to scrutinize punitive damages under the Due Process Clause. (A.22a n.8.)

This Court has refused to impose upon the states a "bright-line" test to determine whether a common law award of punitive damages violates due process so long as there is sufficient judicial review of the reasonableness of the award. *TXO*, 113 S.Ct. at 2720; *Haslip*, 499

(continued...)

OCF argued in the Appellate Division that the punitive damages award violated due process because the jury was not adequately instructed and because the trial court did not conduct a meaningful post-verdict review of the award for reasonableness. The Appellate Division disagreed. (A.22a-23a.) The reasonableness of a punitive damages award is evaluated in light of the potential harm defendant's action could cause, the maliciousness of its actions, and the penalty necessary to discourage the defendant from acting similarly in the future. (A.23a-24a.)

The Appellate Division was acutely aware that it was to review the size of the award in terms of its reasonableness. (A.25a.) The court noted that under *Haslip*, it had a twofold duty. *Haslip*, 499 U.S. at 20-21. The first step was to make sure the jury instructions were adequate and the requisite posttrial review took place in the trial court; the second was evaluate the size of the award. (A.27a.) The Appellate Division satisfied itself that the jury instructions were correct and the trial court granted adequate posttrial review. (A.25a-27a.)

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[9](...continued)
U.S. at 18. The Court's posture is consistent with the *Erie* doctrine. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 65 (1938) (there is no general federal common law; it is not the federal court's role to effect changes in state law); *Dunn v. HOVIC*, 1 F.3d at 1387 (regulations governing punitive damages in Virgin Islands "best left to the United States Congress or the legislature of the Virgin Islands").

The court turned to its second task, the assessment of the reasonableness of the size of the award. The court concluded that the award, though large, did not "jar one's constitutional sensibilities." (A.28a.) It reflected the twin purposes of punishment and deterrence, the harm to Mr. Brennan, OCF's bad faith, its pattern of concealment of the dangers of its product, and the appellant's wealth.

Contrary to OCF's contention in this Court, the Appellate Division afforded OCF the review to which it was entitled in accord with the Court's mandate in *Haslip*.

C. The Ninth Circuit Provided Yet One More Level of Review

OCF faults the Ninth Circuit for allegedly not undertaking the review it claims was neglected by the trial court and the Appellate Division. OCF contends that the Court's decision in *Honda* requires reversal of the punitive damages award. (Pet. 9-10.) OCF is wrong on both points.

As we have explained above, before this matter arrived in the Ninth Circuit, OCF had already had two distinct levels of review of the size of the award. The Ninth Circuit's disposition of the matter is fully consistent with *Honda*.

In *Honda*, under Oregon law, the jury had the final say on the size of punitive damages; they were immune from appellate review. The issue in this Court was whether the due process required review of the size of the judgment at the appellate level. *Honda*, 114 S. Ct. at 2334-2335. The Court held that judicial review of the size

of punitive damage awards was required. *Id.* at 2342. Our case is not *Honda*; Guam and California are not Oregon.

California posttrial procedures meet or exceed the constitutional criteria set forth in *Haslip, TXO*, and *Honda*, 114 S. Ct. at 2338 ("Every other State in the Union [except Oregon] affords post-verdict judicial review of the amount of punitive damages award . . . ."). *See also, Adams v. Murakami*, 54 Cal.3d at 110-11; *Las Palmas Associates*, 235 Cal. App. 3d at 1257-58.

The Guam court followed California law on punitive damages, gave California jury instructions,[9] and applied the California standard of review to the award -- *twice*, first in the trial court and then the Appellate Division. Since the Guam courts followed California law on this issue, and review under California law comports with due process, including the scope of appellate review mandated by this Court in *Honda*, OCF got all of the review to which it was entitled. The Ninth Circuit added yet another level of review, correctly holding: "[T]he trial court did

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[9]California pattern instructions go beyond the Alabama instructions the Court approved in *Haslip* by explicitly directing the jury to fashion an award bearing a relationship to the actual harm and to consider the defendant's financial condition in determining whether the award is sufficient to punish and deter. *Boyle v. Lorimar Productions, Inc.*, 13 F.3d 1357, 1360 (9th Cir. 1994); *Las Palmas Associates v. Las Palmas Center Associates*, 235 Cal. App. 3d at 1257, ("these instructions offer the same degree of protection against arbitrary jury decisions as found constitutionally acceptable in *Haslip*").

not err in affirming the punitive damages award."[10] (A.2a.)

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[10]OCF professes to find a conflict between this case and cases which hold that the Due Process Clause requires meaningful review of the size of punitive damages awards. (Pet. 10-12.) OCF also purports to find a conflict between state and federal courts on the same issue. (Pet. 16-18.) We are at a loss to understand the reasoning behind these sections of OCF's brief. All courts are bound by this Court's holdings. The reviewing courts here did not carve out any exception to *Haslip*, *TXO*, or *Honda*.

If Guam were a state, its court of appeal would provide appellate review of trial court proceedings. Primary review is in the intermediate appellate court, although the losing party might obtain either discretionary review or review as of right in the state's supreme court. In Guam, the Appellate Division sits as the Guam court of appeal, and the Ninth Circuit is its supreme court. There was extensive appellate review of the size of the award by the Guam "court of appeal." The "supreme court" also reviewed the trial court proceedings and affirmed. There is no conflict between this case and the cases cited by OCF. Since there is no conflict, and neither reviewing court decided any issue of federal law, there is nothing for this Court to review. S. Ct. R. 10(a).

II. THERE WAS NO SUBSTANTIVE DUE PROCESS VIOLATION BECAUSE OCF NEVER INTRODUCED EVIDENCE IN THIS CASE OF ASSESSED AND PAID PUNITIVE DAMAGES IN PRIOR CASES

OCF complains that the amount of punitive damages imposed is grossly excessive under the same factors present in *BMW of North America v. Gore*. (Pet. 13-19.) The factors argued in *BMW* include adherence to industry standards, compliance with statutory disclosure regulations, and the effect of multiple awards arising from the same course of conduct. (Pet. 13-15.)

BMW is not our case. First, as we have explained, OCF did not prove at trial that it adhered to any industry standards. Quite the contrary. Assuming there were voluntary standards in the 1950s and 1960s when Brennan was exposed to Kaylo, OCF did not meet those standards. OCF did not conduct its own tests, and tests conducted by outsiders revealed dust counts substantially higher than recommended by some non-governmental hygienists in the industry. See discussion at 4-5 & n.3, supra. As we have also pointed out, there were no government standards regarding warning labels until OSHA promulgated regulations in 1972, just as OCF took the asbestos out of Kaylo. And, right up to the bitter end, OCF resisted the notion it should provide compete warning labels. *Id.*

Second, the issue of prior multiple awards of punitive damages is not properly before this Court because OCF elected not to raise it in the trial court. Accordingly, the issue was not preserved for review in the Appellate Division and could not properly be raised in the Ninth Circuit.

Next, under California law (followed by the Guam courts in this case), the amount of punitive damages deemed necessary to punish and deter is determined at the time of trial, in this case June and July of 1991. The defendant's claim to a substantive due process violation must be evaluated in light of the sums needed to punish and deter in 1991. We agree that sometime, somewhere, juries will have imposed exemplary damages in an aggregate sum sufficient to punish and deter, OCF will introduce competent evidence of amounts it has paid, and any further awards will violate substantive due process. That day has not yet arrived -- or at least had not arrived when the Brennan matter was tried.

A. The Defendant Did Not Preserve the Issue of Successive Punitive Damage Awards for Review by This Court

OCF has waived any error relating to the constitutionality of successive punitive damages.

Under this Court's rules, a petitioner must make specific reference to places in the record where the challenged matter appears to show that the Court has jurisdiction to review the judgment. S. Ct. R. 14(g). In addition, the Court has traditionally declined to review "a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground." *Sochor v. Florida,* 112 S. Ct. 2114, 2119 (1992) (failure to object to jury instruction precluded review); *cf., Chambers v. Mississippi*, 410 U.S. 284, 302-303 (1973) (states afforded wide latitude in developing procedural rules).

As a procedural matter, an issue not preserved in the trial court will not be considered by reviewing courts, and a theory not raised in the trial court cannot be asserted for the first time on appeal. *Ernst v. Searle*, 218 Cal. 233, 240-41, 22 P.2d 715 (1933); *North Coast Business Park v. Nielsen Const. Co.*, 17 Cal. App. 4th 22, 28-29, 21 Cal. Rptr. 2d 104 (1993). Where a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer cannot later use that tactical decision as the basis to claim prejudicial error on appeal. *Mesecher v. County of San Diego*, 9 Cal. App. 4th 1677, 1686, 12 Cal. Rptr. 2d 279 (1992); *and see, Pat Rose & Assoc. v. Coombe*, 225 Cal. App. 3d 9, 23-24, 275 Cal. Rptr. 1 (1990) (failure to present evidence on an issue is waiver of claim of error on that issue on appeal).[11]

OCF may not by-pass a state court procedure by not offering evidence, then argue that the result is substantively unconstitutional. *See, Yee v. City of Escondido*, 112 S. Ct. 1522, 1528-29 (1992). Some indication of possible liability for punitive damages is made part of the Form 10-K OCF files each quarter with the SEC. (R.853-854.) OCF moved to exclude the Form 10-K from evidence (C.R. 1930) and succeeded in keeping out the pages referring to asbestos litigation and punitive damages. (R.857.)

OCF presented the trial court with no evidence whatsoever of prior awards of punitive damages made and paid. Therefore, it could not *properly* raise a due process claim with respect to successive punitive damage awards

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[11]Disapproved on other grounds in *Adams v. Murakami*, 54 Cal. 3d at 116.

because it did not preserve the issue by presenting evidence in the trial court. Instead, OCF tried to raise the issue for the first time on appeal by attaching documents to its reply brief in the Appellate Division. However, reviewing courts will not consider facts outside the record developed in the trial court. *United States v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). The Appellate Division explained the court was "confined it its deliberations to the record before it," and appropriately struck all the improper material.[12] Order (Oct. 18, 1993). Because the Appellate Division did not consider the issue in its decision, the issue was not preserved and could not properly be raised in the Ninth Circuit. *Compare, Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993).

The rule is illustrated in *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1287 (2d Cir.), cert. denied, 489 U.S. 920 (1990), where the court declined to consider the argument of one defendant that multiple imposition of punitive damages for the same course of conduct violated due process because the defendant did not raise the issue in the trial court.

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[12]OCF has repeatedly -- and improperly -- attempted to interject into appellate proceedings unsubstantiated claims of punitive damage awards, but never submits any documentation whatsoever to prove whether it has actually paid *any* punitive damages. For example, in this case, OCF tried to persuade the Appellate Division to consider its March 31, 1993, SEC filing reflecting the alleged fact that as of March 31, 1993, OCF had "resolved" 107,800 asbestos cases. (OCF App. Div. Rep. Br. 45 & Ex. F (struck by the Appellate Division because it was outside the record on appeal)).

Since OCF by-passed state procedure by not offering evidence of prior punitive damage awards, OCF cannot point to any place in the record where the federal question was timely and properly raised. S. Ct. R. 14(g). The record is insufficient to permit examination of their due process claim. In *TXO*, the Court declined to consider an issue not properly presented to the highest state court. 113 S. Ct. at 2723-24. As in *TXO*, we ask the Court not to pass on the issue. Out of the proverbial abundance of caution, however, plaintiff will address the defendant's arguments.

B. Successive Punitive Damages Are Not Per Se Unconstitutional

OCF challenges the constitutionality of successive awards of punitive damages. (Pet. 14-15.)

Every court that has considered the question has concluded the Fourteenth Amendment does not insulate a manufacturer of a defective product from successive punitive damage awards based on the marketing of the product. *See, e.g., Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 808-09, 174 Cal. Rptr. 348 (1981); *Dunn v. HOVIC*, 1 F.2d at 1385-86; *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1096-97 (5th Cir.), *cert. denied*, 112 S. Ct. 1778 (1991); *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022, 1031-33, *cert. denied*, 497 U.S. 1057 (1990); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 280-83 (2d Cir.), *cert. dism.*, 497 U.S. 1057 (1990).

We have no quarrel with the general principle that the amount of punitive damages paid in the past may be a

relevant factor a jury could consider in assessing punitive damages in a particular case. Nonetheless, the plaintiff maintains that in order to preserve the twin goals of deterrence and punishment, the OCF must present competent evidence at trial that it has paid prior awards, and those payments were sufficient to punish and deter.[13] (R.4122-23.) If, having heard that evidence, the jury nonetheless imposes additional damages, the trial court and

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[13]Instead, OCF brings its claims in this Court, arguing that it has been sued by hundreds of thousands of persons, has taken a charge against earnings, and as of February 1994, 38 juries had imposed $77 million in punitive damages against OCF. Of course, OCF did not introduce this "evidence" during the 1991 trial, and it has never been challenged on cross-examination. Further, OCF's claim is egregiously deceptive. The gross sum of $77 million must be adjusted for cases where the jury award has been remitted in posttrial proceedings or reduced through settlement negotiations. For example, in *Dunn v. HOVIC*, 1 F.3d 1371, a $25 million award was reduced to $1 million. OCF's gross $77 million figure undoubtedly includes the *Dunn* $25 million, the unpaid $4.125 million in this case, and the unpaid $4 million awarded in *Owens-Corning Fiberglas v. Rekdahl*, Case No. 95-818 (Pet. for Writ of Cert., filed Nov. 22, 1995). What OCF needs to prove *at trial* is that the *net* amount of punitive damages it has paid exceeds constitutionally tolerable limits.

The much-lamented "charge against earnings," never introduced at trial, is merely a bookkeeping device by which a company creates a paper reserve to provide for possible future liabilities. It does not mean that OCF must pay, has paid, or will pay, anything at all out of the reserve. The "charge against earnings" does have the attractive advantage of being a tax deduction.

OCF's repeated protestations that it has been wronged remind us of the warning, "The louder he talked of his honor, the faster we counted our spoons." Emerson, The Conduct of Life, *Worship* (1860).

the reviewing court can undertake a meaningful posttrial inquiry -- based on the evidence -- into the issues of whether past awards and payments of punitive damages were indeed sufficient to punish and deter and whether another award would violate due process.

This is the approach adopted by the Second Circuit in *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277. In *Simpson*, defendant Pittsburgh Corning sought to avoid a punitive damage award based on a claim it had already paid punitive damages for the same course of conduct. *Id.* at p. 280. The reviewing court disagreed. Assuming that a civil litigant has a due process right to protection from repetitive punitive damage assessments, the defendant could make such a showing in one of two ways. In the "single punitive award" approach, the defendant could show it had previously been punished for the full extent of its wrongful conduct, not merely that it had been *assessed* a sum appropriate to punish it for injuries to particular plaintiffs. Or, under the "aggregate punitive award" approach, the defendant could show that the sum of all punitive damages awards it had paid reached the maximum tolerable under the due process clause. Since the defendant presented no proof of either alternative, the court rejected its claim. *Id.* at 280-81; *see also, Kochan v. Owens-Corning Fiberglas Corp.*, 610 N.E.2d at 694 (defendant bears burden of proof on this question); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d at 812 (if defendant is confronted with possibility of punitive award in subsequent case for the same conduct, it can raise the issue of successive awards in the next case).

Simpson, decided in 1990, surely put the asbestos manufacturers on notice that if they wished to raise a possible due process violation based on successive awards

of punitive damages, they bore the burden of establishing at trial that they had paid so much in prior awards that one more would be constitutionally intolerable. OCF elected not to do this.

Inasmuch as OCF presented no proof of either alternative explained in *Simpson*, there was nothing for any of the three courts (which have already examined the substantive due process claim) to review. There being no evidence, there is nothing for this Court to review either.

C. At the Time of Trial OCF Had Not Actually Paid Any Punitive Damages

Under California law, which Guam applied in this case, the reasonableness of the amount of punitive damages is measured against the defendant's financial condition at the time of trial. *Mariott v. Williams*, 152 Cal. 705, 710, 93 P. 875 (1908); *Washington v. Farlice*, 1 Cal. App. 4th 766, 777, 2 Cal. Rptr. 2d 607 (1991).

Someday, OCF may actually pay punitive damages. Somewhere, in some case, OCF will present to the finder-of-fact competent evidence of those payments. The day will come when the fact finder will say, "enough" -- OCF has paid sufficient punitive damages to satisfy society's goals of deterrence and retribution for its egregious course of misconduct which cost so many so much needless pain, suffering, and death. Yet another award would be constitutionally intolerable.

But in this case, as of June and July of 1991, OCF offered no evidence of prior punitive damages imposed and paid. Since punitive damages are measured by the

defendants' financial condition at the time of trial, and the properly instructed jury did just that, there is nothing for this Court to review.

III. EVEN IF THIS COURT DECIDES *BMW* FAVORABLY TO THAT DEFENDANT, THE JUDGMENT IN THIS CASE WILL NOT CHANGE

OCF professes to find great similarities between this case and *BMW of North America v. Gore*. The real issues in *BMW* bear little resemblance to the issues OCF raises in this Court. First, in *BMW*, the Alabama jury awarded punitive damages based not on the defendant's fraud against a single plaintiff, but upon the multiple frauds involved in refinished vehicles sold throughout the United States. By contrast, California jury instructions, which were given here, make it clear that the jury was punishing the defendant only for its reprehensible conduct against the individual plaintiff. (R.1121 (punitive damages must bear reasonable relation to actual damage suffered by the plaintiff).)

Second, the relationship between punitive damages in the *Brennan* case is nowhere near 500 times the amount of compensatory damages it was in *BMW*. Brennan's compensatory damages were $2.5 million. Punitive damages imposed on OCF were $4.125 million. The ratio of punitive damages to compensatory damages is less than 2 to 1.

Third, OCF's claim that it is insulated from punitive damages because its conduct matches that of BMW (i.e., OCF labeled its Kaylo and otherwise complied with industry standards) is not supported by the record or case

law. (Pet. 10.) Before 1972, OCF *never* warned that exposure to its products could cause disease. (R.426-27, 543, Supp. R.1102.) And, as we have explained, there were no controlling regulations, and OCF did not even comply with voluntary standards. See discussion at 4-5, *supra*. Even *if* there had been government or industry standards, and even *if* OCF had complied with them, it still would not be immune from punitive damages under California law. One reason punitive damages developed is *because* "[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacturer and distribution of defective products." *Grimshaw*, 119 Cal. App. 3d at 810.

Finally, from what members of bench and bar could glean from the tenor of argument in *BMW*, the punitive damages issues which appeared to concern the Court in *BMW* are totally different from the issues OCF raises here.

OCF suggests that this Court should grant and hold the petition until its decision in *BMW*, and then dispose of it in light of *BMW*. If the Court does not grant certiorari, OCF suggests that the matter be remanded for further appellate review.[14] (Pet. 15, 18.) A remand in light of *BMW* on the issue of multiple awards would not affect the

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[14]From notice of appeal in Guam (11/28/92) to petition for certiorari in this Court (11/21/95), the appeals process consumed three years. OCF routinely waits until the very last day to perform every act required during the appellate process. While we recognizes the defense entitlement to invoke legal means to postpone payment of the judgment, ethically and morally it is difficult to justify deliberate and avoidable delays in the appellate processes as a means to that end.

issue. Accordingly, there is nothing for the Appellate Division or the Court of Appeals to review anew. Since there is no evidence to re-review, the Court may rest assured that if it remands the case, the result will be the same, another round of appeals will ensue and this Court can expect to see the same matter sometime in 1998 or 1999.

CONCLUSION

"Delay of justice is injustice." *People v. Hartman*, 170 Cal. App. 3d 572, 216 Cal. Rptr. 641 (1985). This case was tried four and one-half years ago. It has been on appeal for three years. The Brennan family asks this Court to deny the petition so that society's goals of punishment and deterrence finally may be satisfied, and the family at long last will have closure following the sorrowful experience of losing Patrick Brennan to a horribly painful disease.

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Respectfully submitted,

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